IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

CITY OF CHICAGO,	)	
	)	
Plaintiff,	)	
	)	
-vs. -	)	No. 11 MC1-237718, et seq.
	)	
	)	
TIEG ALEXANDER, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the court on Defendants' Joint Motion to Dismiss charges brought against them by the Plaintiff City of Chicago ("City") for violating the 11:00 p.m. to 6:00 a.m. curfew in Grant Park under Chapter VII, Section B.2 of the Chicago Park District Code (the "Curfew").[1] Certain defendants[2] assert that the Curfew is unconstitutional on its face because it acts as a blanket bar on all speech in the public park after 11 p.m. All 92 defendants contend that the Curfew was unconstitutional as applied because it was arbitrarily enforced against them based on the content of their speech. The City opposes Defendants' Motion to Dismiss, contending that the Curfew is a valid time, place, or manner restriction on conduct or speech protected by the First Amendment. The City also claims the Curfew was applied in a content-neutral manner and left open ample alternative channels of communication for the Defendants' speech activity. As explained below, the Curfew violates the right to

[1] Chi. Park Dist. B. Comm'rs, The Code of the Chi. Park Dist. (2012). Available at http://www.chicagoparkdistrict.com/departments/board-of-commissioners/pdf-group-board-code/

[2] Samuel Brody, Alison Feser, Andréa Ford, Matthew Furlong, Noah Glasser, Greg Goodman, Robert Jennings, Neil Landers, Bonnie Osei-Frimpong, Irami Osei-Frimpong, Jeremy Siegman, Kailash Srinivasan.

free assembly under both the United States Constitution and Illinois Constitution. Because parks constitute public forums for citizens to assemble and express political views, governments may only institute content-neutral time, place or manner restrictions that tightly fit substantial government interests. The City's claim that citizen safety, park maintenance, and park preservation constitute the substantial government interests that justifies closing the park seven hours nightly fails because the City routinely closes the park for fewer than seven hours nightly, making ad hoc exceptions to the Curfew for permitted groups. Thus, the City necessarily concedes that fewer than seven hours suffices to satisfy the substantial government interests. Because it is undisputed that the City closes Grant Park longer than necessary to serve the governments interests, the Curfew is not narrowly tailored, in violation of the First Amendment. The Curfew also violates the Illinois Constitution which provides a more vigorous right to free assembly, embracing even non-expressive assemblies.

Additionally, while the City arrested everyone remaining in Grant Park during the Occupy Chicago rally, the City arrested no one at the Obama 2008 presidential election victory rally, even though the Obama rally was equally in violation of the Curfew. That violates Defendants' right to equal protection because it treats similarly situated citizens differently. Accordingly, the Curfew is unconstitutional both on its face and as applied, and all complaints in this case are dismissed with prejudice.

I. Facts

"Occupy Chicago" is part of the broader political and social "Occupy" movement against, among other things, excesses of corporate power and an economic system that favors the wealthiest one percent of the population at the expense of the remaining

ninety-nine percent. The Occupy movement communicates this message through continuous occupation of a physical location in the vicinity of the workplace of the one percent. Accordingly, Occupy Chicago established a continuous physical presence outside the Federal Reserve and Chicago Board of Trade buildings at the intersection of Jackson and LaSalle Streets in Chicago on September 22, 2011.

On October 15, 2011, Occupy Chicago held a rally in the vicinity of Jackson and LaSalle Streets. After the rally, protesters marched around downtown Chicago for approximately an hour before making their way to Grant Park. In Grant Park, the protestors made speeches, chanted slogans and erected tents. Between 7:15 p.m. and 8 p.m., approximately 3,000 protestors had gathered in Grant Park. According to Chicago Police, the number of protestors dwindled to roughly 700 by 8 p.m.

At various points between the hours of 8 p.m. and 11 p.m., the Chicago Police Department made it known to the protestors that Grant Park closed at 11 p.m. and that anyone refusing to leave Grant Park would be in violation of the law and subject to arrest. At 10:45 p.m., approximately 200-300 protestors chose to leave Grant Park and relocate to the sidewalks across the street. The Chicago Police did not immediately arrest the 300 or so protestors that chose to remain in the park at 11:00 p.m., and gave them an additional 2 hours to leave. After a final warning to leave the park was issued at 1:00 a.m., an officer approached every individual remaining in the park and asked whether he or she wanted to leave Grant Park or stay and be arrested. A total of 173 people remained in Grant Park and were placed under arrest.

A week later on October 22, 2011, a similar situation occurred. Again, approximately 1,500-3,000 Occupy Chicago protestors marched from Jackson and

LaSalle Street to Grant Park, where they made speeches and chanted slogans. As before, the Chicago Police made it known to the protestors that Grant Park closed at 11:00 p.m. and those remaining in Grant Park after that time would be subject to arrest. As before, many of the protestors chose to relocate to the adjacent sidewalks before Grant Park's closure. The protestors remaining in the park after 11:00 p.m. were once again approached individually and given an opportunity to leave. This time 130 people remained in Grant Park and were placed under arrest.

The arrested protestors were charged with violating the Curfew, which provides in pertinent part: "No person shall be or remain ... in any part of any park ... between the hours of 11:00 p.m. and 6:00 a.m. on the following day ...." Chi. Park Dist. B. Comm'rs, The Code of the Chi. Park Dist., ch. VII § B.2 (2012). The Defendants move to dismiss claiming that enforcement of the Ordinance violated their rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

II. Constitutional Principles

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const. amend. I. It applies to states and local governments under the Due Process Clause of the Fourteenth Amendment. See Gitlow v. New York, 268 U.S. 652, 666 (1925).

The Equal Protection Clause provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Free Assembly Protections under the U.S. Constitution

Free assembly ranks as a fundamental right equal to free speech and free press. United States v. Cruikshank, 92 U.S. 542, 552 (1876); see also Brandenburg v. Ohio, 395 U.S. 444, 449 n. 4 (1969). They are "cognate," hence interchangeable. Brandenburg, 395 U.S. at 449 n. 4. Whenever the word "speech" appears in a First Amendment case, you can accurately put in the word "assembly." See id. Statutes affecting assembly fall subject to strict scrutiny, just as if they touched on speech. De Jonge v. Oregon, 299 U.S. 353, 364 (1937). Peaceful, orderly assembly "falls well within" the First Amendment's protection. Gregory v. City of Chicago, 394 U.S. 111, 112 (1969). There was no clearer purpose in ratifying the Bill of Rights than "securing" for Americans much greater freedom of "assembly" than the English had ever enjoyed. Bridges v. California, 314 U.S. 252, 265 (1941). The "restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing." Id.

The Illinois Constitution's Free Assembly Guarantee

"The people have the right to assemble in a peaceable manner ... ." Ill. Const. art. I, § 5.

III. Chicago Park District Ordinances

The Chicago Park District may establish by ordinances for the government and protection of parks under its jurisdiction and provide penalties not exceeding $500 for any one offense for violations. 70 ILCS 1505/7.02 (2012). An action to recover a penalty for the violation of ordinances, though quasi-criminal in character, is civil in form

and falls subject to the rules governing civil actions. See City of Danville v. Hartshorn, 53 Ill. 2d 399, 402 (1973).

IV. Procedural Background

In civil actions, where other affirmative matter bars the claim asserted, it may be dismissed. 735 ILCS 5/2-619(a)(9) (2012). *Affirmative matter* encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action. If the *affirmative matter* is not apparent on the face of the complaint, the motion must be supported by affidavit. 735 ILCS 5/2-619(a) (2012); see also 4 Richard A. Michael, Ill. Practice Series Civil Procedure Before Trial § 41.8, 481 (2d ed., West 2011). By presenting adequate affidavits supporting the asserted defense, defendant satisfies the initial burden of going forward on the motion. The burden of production then shifts to the plaintiff. The plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. The plaintiff may meet his burden by affidavit or other proof. 735 ILCS 5/2-619(c) (2012). If no counter-affidavit is submitted, the evidentiary facts of the original affidavit are admitted. If, after considering the pleadings and affidavits, the plaintiff has failed to carry the shifted burden going forward, the motion must be granted and the cause of action dismissed. Kedzie and 103rd Currency Exch., Inc. v. Hodge, 156 Ill. 2d 112, 115-16 (1993).

After considering the affidavits, if a genuine issue of material fact exists, the court may not determine the matter solely based on the affidavits; it must allow the parties an

opportunity for an evidentiary hearing.[3] Consumer Elec. Co., v. Cobelcomex, Inc., 149 Ill. App. 3d 699, 704 (1st Dist. 1986); Michael, 4 Illinois Practice at § 41.8, 485.

V. *Discussion*

Certain defendants argue that the Curfew is unconstitutional on its face because it operates as a blanket bar on all speech in the public park, is not narrowly tailored to serve a significant government interest and does not leave open ample alternative channels of communication. All defendants argue that the Curfew is unconstitutional as applied in this case because Chicago police had discretion whether to enforce the park Curfew and, on the nights in question, exercised that discretion in a deliberate and intentionally discriminatory manner by misleading Defendants to believe that the Curfew would not be enforced.

1. *The Curfew is Facially Unconstitutional*

Content-neutral restrictions that have an incidental burden on speech are subject to an intermediate level of scrutiny. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994). To find an ordinance facially invalid the court must determine there exists "'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of *parties not before* the Court.'" New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11 (1988)(italics added); see also Bell v. Keating, No. 11-2408 (7th Cir. Sept. 10, 2012) slip op at 9-10 (overbreadth analysis). To survive such scrutiny, the Ordinance must be "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels for communication of the information." Ward v. Rock Against Racism, 491 U.S. 781, 791(1989). However,

[3] If the plaintiff is entitled to a jury trial and has made a timely demand, the court must deny the motion without prejudice and allow the defendant to re-raise the issue in the answer. A.F.P Enter., Inc. v. Crescent Pork, Inc., 243 Ill. App. 3d 905, 913 (2d Dist. 1993).

the nexus between the law and the "significant governmental interests" must be "close enough to pass constitutional muster." Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048, 1060 (7th Cir. 2004) (voiding curfew law because parental escort requirement too burdensome).

Whether we call it "'narrowly tailored'" or "'no more burdensome than is essential'" is of no moment; the law must be "no more restrictive than necessary to further the governmental interest, regardless of whether or not there is an easier way." Id. The "'government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" Id. (italics added); see also Bell v. Keating, No. 11-2408 (7th Cir. Sept. 10, 2012) slip op at 20-21. Thus, while content neutral regulations are presumptively valid, an important public interest must justify the regulation, and the regulation must *tightly fit* the interest served. ACLU v. Alvarez, 679 F.3d 583, 605 (7th Cir. 2012). The burden on First Amendment rights "must not be greater than necessary" to further the important government interest. Id. A facial challenge to a content-neutral law must establish that: the Ordinance is unconstitutional in (1) all its applications or (2) in a substantial number of its applications. See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-50 (2008) (candidates may choose their own party affiliation on a ballot without confusing voters); United States v. Salerno, 481 U.S. 739, 745 (1987).

Additionally, the First Amendment requires deference to the speaker's determination as to how the message should be disseminated. Riley v. Natn'l Fed'n of the Blind in N.C., Inc., 487 U.S. 781, 790-91 (1988) (charities may decide how best to fundraise). For example, where spontaneity forms part of the message, "'dissemination

delayed is dissemination denied.'" Vodak v. Chicago, 639 F.3rd 738, 749 (7th Cir. 2011). Speakers, "not the government, know best both what they want to say and how to say it...." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 790-91, Hodgkins, 355 F.3d at 1063.

Government's Sharply Circumscribed Power to Limit Assemblies in Parks

Government must tread carefully when restricting assembly in parks because they have traditionally been the sites for public assembly. In parks, the powers of government "to limit expressive activity are sharply circumscribed." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Parks "have immemorially been held in trust for the use of the public" and, perpetually, they "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. While the government may "enforce regulations of the time, place, and manner of expression which are content-neutral," they must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Id.

Provided they pass constitutional muster, park closing restrictions certainly constitute "reasonable exercise of the Park District's powers." Chicago Park Dist. v. Altman, 127 Ill. App. 2d 467, 470 (1st Dist. 1970). There is a substantial government interest in conserving park property. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984) (concerning a rule against camping or overnight sleeping in public parks). Park managers may require that *camping in certain parks* be prohibited. Id. Where the protesters are allowed to occupy the park all night and erect symbolic tents the minimal restriction of forbidding actual sleeping in those tents forms a

reasonable restriction: "the deprivation of [an individual's] uncontrolled liberty, by limiting his absolute use of the park, is minimal compared to the desirable public safety and welfare objectives served by this ordinance." Clark, 468 U.S. at 299. By contrast, banning a "*specified communicative activity,*" such as picketing, in a particular public forum does not constitute a valid time, place, or manner restrictions if there is an insufficient nexus with the purported governmental interest. United States v. Grace, 461 U.S. 171, 177 (1983) (invalidating the ordinance as applied to the sidewalks but not as to other parts of the grounds)(italics added).

Late Night Assemblies

Laws curtailing the rights of citizens to participate in late night assemblies reach "a substantial amount of protected conduct." See Hodgkins, 355 F. 2d at 1062. While "no doubt many if not most of the participants would find it more convenient to exercise their First Amendment rights other than in the dead of night," it is not coincidental that "so many of the expressive activities ... occur late in the evening." Id. at 1062. Because so many expressive activities take place at night, government actions that curtail nighttime assemblies necessarily impose a burden on expressive First Amendment conduct.

While "the late hour of the activity may be dictated by necessity -- as, for example, when citizens wish to observe or influence a legislative session that extends into the late hours, or a down-to-the-wire election postpones a celebration for the winning candidate until the wee hours of the morning," more often, however, "the late hour is closely linked with the purpose and message of the activity." Id. For example, "Take Back the Night marches and rallies frequently extend to and after midnight in order to

protest the crimes that jeopardize the security of women at night." Id. Additionally, "[e]xecutions of prisoners on death row often are carried out shortly after midnight or in the early hours of the day, and so are routinely attended by all-night vigils held by those for and against the death penalty." Id. at 1062-63. Significantly, "Kristallnacht (Night of Glass) is commemorated with late-night prayers and vigils because it was after midnight one evening sixty-five years ago when Nazi hooligans looted and destroyed Jewish businesses, homes, and synagogues in Germany." Id. at 1063. Religious assemblies also occur in the dead of night: "In the final days of Ramadan, mosques remain open all night so that Muslims may mark Lailat al-Qadr (Night of Power), the night when the prophet Mohammed first received revelations from the angel Jibra'el (Gabriel), by holding vigil in prayer, Qur'anic reading, and contemplation." Id. Political movements often employ all-night vigils because of their commemorative power: "it was after midnight one evening in October 1998 when young Matthew Shepard was beaten, burned, and lashed to a fence, and left for dead outside of Laramie, Wyoming; and so it is that candlelight vigils were and are held in the middle of the night to protest the homophobia that motivated his killers." Id. at 1063.

Under the First Amendment, if the burdens imposed on expressive activity are greater than necessary to serve the substantial government interest, it is inadequate to claim that the citizens could engage in "protected activity during the ample [daylight] hours," or "during [late night] hours" in other places. Id. at 1062.

The Greater Protections Afforded Under the Illinois Constitution

Illinois gives citizens "every protection" of the First Amendment and more. Sixth Ill. Const. Convention, 3 Record of Proceedings 1403 (June 2, 1970) (hereinafter

"Proceedings") (statement of Elmer Gertz, Chair, Bill of Rights Committee)(referring to "added protections" referring specifically to libel, but also to "other fields" of expressive activities); see also People v. DiGuida, 152 Ill. 2d 104, 120-21 (1992)("the Illinois Constitution may provide greater protection to free speech than does its Federal counterpart" but only against government actors).

Reviewing the debates of the constitutional convention, it becomes clear that the delegates intended Illinois' protection to be broader in one very salient respect. While the U.S. Constitution accords protection to assemblies with an expressive purpose, the Illinois Constitution accords full protection to assemblies regardless of their expressive purpose. The 1970 constitution changed the text of the free assembly clause to assure that it protected all assemblies regardless of purpose. 6 Proceedings at 61-62 (report of the Bill of Rights Committee). Unanimously, the Bill of Rights Committee voted for this new version that assures the people the right to assemble in a peaceable manner even though their purpose is other than "to consult for the common good, or to make known their opinions to their representatives, and to apply for redress of grievances." Id. Putting a comma between the phrases "peaceable manner" and "consult for the common good" accorded protection to all as long as they gather peacefully. See 3 Proceedings at 1480 (June 3, 1970) (statement of Father Francis X. Lawlor, delegate and the member of the Bill of Rights Committee designated to speak on behalf of the committee with respect to free assembly). The insertion of the comma created an unqualified, "independent" right to assemble in a peaceable manner. Ill. Const. art. I, § 5; Ann M. Lousin, The Illinois State Constitution: A Reference Guide 47 (Praeger 2010). Thus, Illinois accords

complete protection to assemblies regardless of purpose, embracing non-expressive assemblies. By contrast, the First Amendment protects only expressive assemblies.

Illinois has long "respected and jealously guarded" the right "of all to assemble together" peacefully for whatever reason they please. Village of Des Plaines v. Poyer, 123 Ill. 348, 351 (1888). Because the freedom to assemble "may be abused," that "is no reason why it shall be denied." Id. Despite instances in the recent past where the people had abused the right to assembly, the Bill of Rights Committee and the Convention rejected all efforts to limit the right to peaceful assembly in any way. Father Lawlor explained why, despite past abuses, the right to assemble must remain unrestricted except in cases of imminent violence. The events leading up to the 1970 Constitutional Convention had put the right to assembly "in the public mind." 3 Proceedings at 1480. It was a matter much before the courts and debated in the newspapers daily. Id. Because assemblies had ended in violence, riots, vandalism, and death, many "would be of a mind to place limitations" on assembly. Id. But the "very nature" of free assembly is that citizens must face people or ideas we find unpleasant, assembly is essential to a free society, it gives us a very important "opportunity to get to the root of problems ... ." Id. at 1480-81. Assembly, along with speech and press, form the "three areas that are dear to the hearts of most Americans - basic freedoms." 4 Proceedings at 3645. Assembly has been "fought for dearly throughout this nation ... ." Id. It belongs to unions, racial groups, ethnic groups, religious groups, parents, and students. 3 Proceedings at 1481. "The young people certainly" have the right to assemble. 4 Proceedings at 3645.

All Illinois constitutions have embraced free assembly. See Ill. Const. of 1818, art. VIII, § 19; Ill. Const. of 1848, art. XIII, § 21; Ill. Const. of 1870, art. II, § 17. As

Abraham Lincoln wrote ten years before the drafting of the 1870 Illinois Constitution, "the right of peaceable assembly" forms a crucial part of "our Magna Carta, not wrested by Barons from King John, but the free gift of states" to the nation. Letter from Abraham Lincoln to Alexander H. Stephens (Jan. 19, 1860), in Uncollected Letters of Abraham Lincoln 127 (Gilbert A. Tracy ed., Cambridge U. Press 1917) (quoted in Melvin Riche, Comments: Freedom of Assembly, 15 De Paul L. Rev. 317, 336 (1966)).

Grant Park's History as a Public Forum

First Amendment facial challenges mandate a historical review because the court must determine whether there exists "'a realistic danger that the [Curfew] will significantly compromise recognized First Amendment protections of parties *not before the Court*.'" New York State Club Ass'n, Inc., 487 U.S. at 11 (italics added). To determine what First Amendment actors will foreseeably do in the future, the court looks at what they have done in the past. See Hodgkins, 355 F. 2d at 1062 (detailing numerous historical examples of late night assemblies to aid in its facial validity analysis of a curfew).[4] The court must not only examine the past expressive activities, but also the actual availability of alternative forums within the municipality. Taxpayers for Vincent, 466 U.S. at 812. Both parties urge the court to take judicial notice of Grant Park's history. The Defendants urge the court to consider the use of Grant Park for political demonstrations. The City urges the court to consider the laws regulating Grant Park's use. The court may properly take judicial notice of historical events. Silberman v.

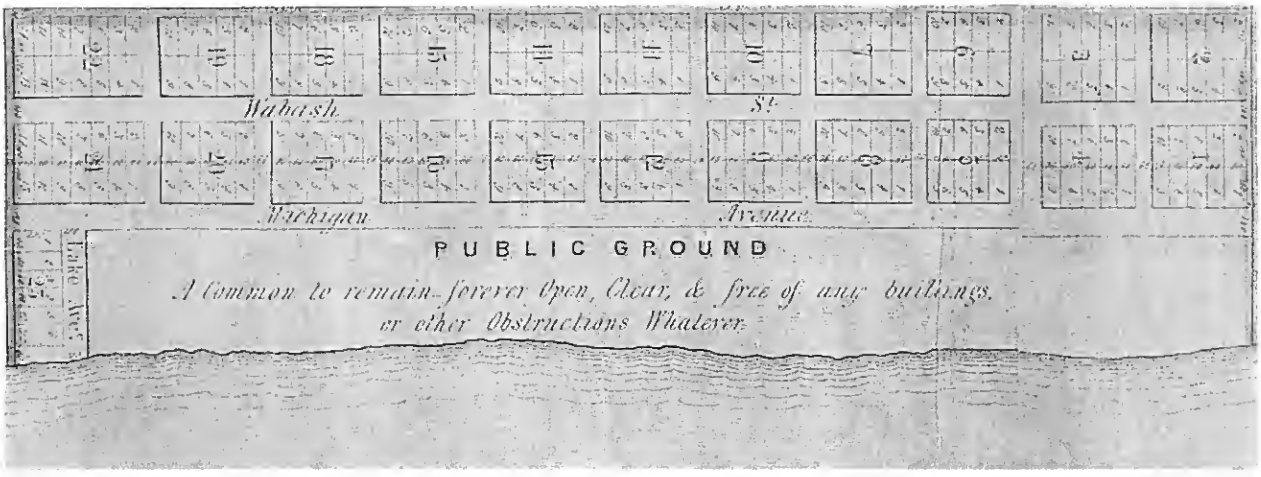
[4] In Hodgkins, the court took judicial notice of numerous historical events not cited by the parties. Brief for Petitioner-Appellant, Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048, 1060 (7th Cir. 2004) (No. 01-4115), 2002 WL 34484796; Brief for Respondent-Appellee, Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048, 1060 (7th Cir. 2004) (No:01-4115), 2002 WL 34484796; Reply Brief for Petitioner-Appellant, Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048, 1060 (7th Cir. 2004) (No. 01-4115), 2002 WL 34484799.

Washington Nat. Ins. Co., 329 Ill. App. 448, 453 (1946) (no abuse of discretion in taking judicial notice that the Isle of Jersey in war zone); cf. Petrich v. MCY Music World, Inc., 371 Ill. App. 3d 332, 341 n. 5 (2007)(judicial notice that the Beatles played in Comiskey Park, not Wrigley Field); Dowie v. Sutton, 227 Ill. 183, 193 (1907) (judicial notice that Boer War in progress during 1901). Because the City's admits it routinely closes Grant Park fewer than seven hours daily and, thus, the Curfew does not tightly fit the government's substantial interests, it renders the historical review largely unnecessary. However, history further strengthens the court's conclusion that the Curfew is unconstitutional.

In November of 1835, two years before the City incorporated, the citizens gathered at one of their weekly town meetings, resolved that the land which would become Grant Park "should be reserved for all time to come for a public square, *accessible at all times* to the people."[5] Between 1836 and 1839 the land that would form the park was declared and lines defining its borders were clarified. City of Chicago v. Ward, 169 Ill. 392, 401-02 (1897). A plat was left with a certificate from the secretary of war that stated, "The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." Id. at 402. The Court opined that, "It is a matter of common knowledge that nearly all of our larger cities have open squares in the business portions of the city, and that these open squares are deemed and considered of great advantage, not only to the public generally, but especially to the abutting property owners." Id. at 413. Transforming that wish into a binding promise to the future residents of the City, the 1836 publically recorded map that platted downtown Chicago indicated that the land which would later form Grant Park

[5] Chi. Dem., Nov. 4, 1835 (italics added).

was: "PUBLIC GROUND [---] A Common to remain forever Open, Clear & free of any buildings, or other Obstructions Whatever:"



On file with the Chicago History Museum ICHi-37310; Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 Nw. U. L. Rev. 1417, 1424-25 (2011); Lois Wille, Forever Open, Clear & Free 22-23 (Henry Regnery Comp., 1972):

What was to become Grant Park became the city's "favorite spot for political rallies and expositions;" Abraham Lincoln spoke there in early 1856 in favor of the new Republican Party and its anti-slavery platform. Wille at 23. An ordinance was passed that allowed the area that stretched from the shoreline to the Illinois Central Railway trestles to be filled in with the rubble from the Chicago Fire of 1871, which greatly expanded the public ground. Ward, 169 Ill. at 406; Kearney at 1431. Twenty years later the United States Supreme Court held that the title to the additional open land created from the rubble belonged to the State of Illinois. Ill. Cent R.R. v. Illinois, 146 U.S. 387, 459-64 (1892). However, the title held is different in character than one intended for sale; it is a title that is held in trust for the people. Id. at 403, 460. These dedicated lands, including the newly formed region of the filled-in basin, were held in trust by the State

for the public only for their expressed or intended purposes. Ward, 169 Ill. at 403, 415; Kearney at 1435. The southern portion of the park was transferred to the South Park Commissioners and, in 1899, renamed "Grant Park." Kearney at 1438. The Illinois Supreme Court reviewing this history concluded that Grant Park in its entirety, the land platted in 1836 together with the landfill added in 1871, constituted land dedicated to the public and that it must remain open and accessible to citizens, unencumbered by buildings or any other obstruction. Ward, 169 Ill. at 414-16.

Grant Park "is the only logical place" for political demonstrations according to suffragettes arguing in 1914 that they be allowed to assemble citizens advocating allowing women the right to vote.[6] Following World War I, jobless soldiers occupied Grant Park overnight continuously to drawing attention to their plight,[7] union members, and the depression era's unemployed gathered in Grant Park.[8] Subsequent to World War II, antinuclear protesters gathered there.[9] During the 1960s, Grant Park hosted many civil rights[10] and antiwar[11] demonstrations. During the 1970s and 80s, antiwar protests were

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[6] *South Park Board Shuts Out Women: Refuses Permit to Hold Big Suffrage Meeting in Grant Park on May 2*, Chi. Trib., Mar. 19, 1914, at 3 (Mrs. H.C. Newton remarked, "'A part of Grant Park should be set aside for public meetings. The parks are supported by the people and they should be for the use of the people.'").

[7] *JOBLESS HEROES FIGHT FOR PLACE ON PARK BENCH: "SAY IT WITH JOBS,"* Chi. Trib., Sept. 9, 1921, at 10; *Jobless Heroes to Parade for Chance to Work*, Chi. Trib., May 22, 1921, at 9.

[8] *50,000 in Parade*, Chi. Trib., Apr. 30, 1922, at 1 (assembling in Grant Park union members marched around the Loop); *Jobless Parade in Loop; Mayor Hears Demands: Relief Pleas are Made Orderly*, Chi. Trib., Nov. 1, 1932, at 11.

[9] *Group Protests A-Bomb Tests*, Chi. Daily Defender, Aug. 5, 1957, at 7.

[10] *Rites Held for Slain Negroes: 6 Kneel All Night at Downtown Corner*, Chi. Trib., Sept. 23, 1963, at 9; *March Honors Slain Civil Rights Worker: Urge Assigning of Marshals in South*, Chi. Trib., Aug. 24, 1965, at A9; *Leaders Set Night Marches Here*, Chi. Daily Defender, June 22, 1965, at 3.

[11] *DEMS RECESS IN UPROAR: 800 Guardsmen Farce Hippies in Park, at Hotel Called Out to Give Police Relief*, Chi. Trib., Aug. 28, 1968, at 1; *20 Hold Protest "Vigil" on Atomic Armaments*, Chi. Trib., Aug. 7, 1961, at 7.

joined by citizens upset over the economy, women rights advocates, abortion foes, union members, Catholic worshipers, and atheists protesting the presence of the worshippers.[12]

In 1928, it hosted 7,000 citizens in a late night gathering across from the Congress Hotel gathering in support of presidential candidate Al Smith.[13] After 1957, citizens began to make more regular use of Grant Park for late night assemblies and vigils.[14] Over a dozen such events took place from 1957 through the 2011 Occupy protests. Significantly, in several events, the police decision not to enforce the Curfew became an issue. Famously the City declined to evict demonstrators from Grant Park in 1968 notwithstanding the Curfew and the demonstrators occupied Grant Park overnight.[15] Eleven years later, Catholic worshipers defied the Curfew in order to secure a good vantage point to observe Pope John Paul II say Mass at Grant Park the following day

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[12] Jeff Lyon, *The World is Still Watching: After the 1968 Democratic Convention, Nothing in Chicago was Quite the Same Again*, Chi. Trib., July 24, 1988, at I8; Ronald Koziol, *Demonstrators Hurl Slogans, Bottles Protesting Nixon Visit*, Chi. Trib., Nov. 10, 1971, at 1; *Peace March Rally Set for Chicago Today: Group Predicts 25,000 Will Participate*, Chi. Trib., May 9, 1970, at 6;*Cops Hold a Photog 11/2 Hours*, Chi, Trib. Jul. 28, 1970, at 2 (photographer arrested covering youth protests in the Park); Robert Nolte & Thomas Seslar, *3,000 Protest Viet War in Loop*, Chi. Trib., May 14, 1972, at 5; James Strong, *Loop March, Rally to Decry High Prices*, Chi. Trib., Sept. 7, 1973, at 5; *Reagan Target of Labor Day Rallies*, Chi. Trib., Sept. 5, 1983, at 4; *Abortion Foes Also Rally*, Chi. Trib., May 11, 1980, at 10;
James Yuenger & Robert Davis, *For 3 Hours, the Park was a Church*, Chi. Trib., Oct. 6, 1979, at B1; Jack Houston, *Atheist to Lead Pope Protest Marchers Here*, Chi. Trib., Sept. 20, 1979, at B1.

[13] *Shivering Crowd of 15,000 Hears Al Outside Armory,* Chi. Trib. Oct. 28, 1928, at 2 (crowd gathered to watch fireworks and see Al Smith appear at window during the late night).

[14] *Group Protests A-Bomb Tests*, Chi. Daily Defender, Aug. 5, 1957, at 7; *20 Hold Protest "Vigil" on Atomic Armaments, Chi. Trib., Aug. 7, 1961, at 7; Rites Held for Slain Negroes: 6 Kneel All Night at Downtown Corner*, Chi. Trib., Sept. 23, 1963, at 9; *March Honors Slain Civil Rights Worker: Urge Assigning of Marshals in South*, Chi. Trib., Aug. 24, 1965, at A9; *Leaders Set Night Marches Here*, Chi. Daily Defender, June 22, 1965, at 3; *DEMS RECESS IN UPROAR: 800 Guardsmen Farce Hippies in Park, at Hotel Called Out to Give Police Relief*, Chi. Trib., Aug. 28, 1968, at 1.

[15] Dean Blobaum, Chicago '68: A Chronology available at http://chicago68.com/c68chron.html; Jeff Lyon, *The World Is Still Watching: After The 1968 Democratic Convention, Nothing In Chicago Was Quite The Same Again,* Chi. Trib. Jul. 24, 1988: I8, pp. 12-13; *DEMS RECESS IN UPROAR: 800 Guardsmen Farce Hippies in Park, at Hotel Called Out to Give Police Relief*, Chi. Trib., Aug. 28, 1968, at 1.

by.[16] The police again elected not to enforce the Curfew. Later, in 1986, nuclear disarmament protesters voiced strong objection to the Curfew and camping ban.[17] Then, of course, the Obama election night victory rally kicked off a few minutes before the Curfew went into effect and stretched into the late into the night.[18] The Curfew was not enforced.[19]

Complete Ban on Expressive Activity in Grant Park from 11:00 P.M. Until 6:00 A.M

Indisputably, the Ordinance challenged by the Defendants does not describe speech by content on its face, nor does it distinguish favored speech from disfavored speech on the basis of the ideas or views expressed. Instead, the Curfew acts as a uniform regulation of conduct, prohibiting anyone from remaining in a public park between the hours of 11:00 p.m. and 6:00 a.m. The Curfew is content-neutral on its face. The Curfew "has existed in one form or another since October 16, 1934 ... in order to keep the parks safe, clean, attractive, and in good condition." Furthermore, "park hours of closure allow park employees collect trash, make repairs to park facilities, and maintain the landscaping." Also, prohibiting access during these nighttime hours ensures, the City claims, "that park facilities do not become over-fatigued" and "reduces crime

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[16] Andy Knott, *Campers defy police: vigil starts early at park*, Chi. Trib., Oct. 5, 1979, at 10 ("Police soon gave up [enforcing the Curfew], and the sergeant said the crowd would be left alone 'along as the Park District doesn't mind.'")

[17] *Marchers protest park-camping ban*, Chi. Trib., Aug. 10, 1986, at A3.

[18] Obama took the stage at Grant Park at 10:57 p.m. See Jill Zuckman & John McCormick, *How they spent Election Day*, Chic. Trib., Nov. 5, 2008, at 5. Accessed at http://www.proquest.com/docview/420810827 (last visited Sept. 20, 2012). Based on a 10:57 p.m. time reference for Obama's approach to the stage, Obama's speech ended near 11:20 p.m. and exited the stage around 11:23 p.m. according to a C-SPAN video of Obama's full delivery of the speech. See C-SPAN: President-Elect Barack Obama Victory Speech (Full Video), http://www.youtube.com/watch?v=jJfGx4G8tjo (last visited Sept. 20, 2012).

[19] The City permit allowed the rally to extend well after 11:00 p.m., closing the park only 5 hours that night, allowing amplified sound " 9 pm and 1 am." James Janega, No beer tents at Obama event, Chi. Trib. (October 30, 2008).

against park patrons and park property." Thus the Curfew also serves legitimate government interests.

The Curfew, however, must also be narrowly tailored, leave open ample alternative channels of expression, and the restrictions on expression must tightly fit the government's objective. A facial challenge focuses on whether third parties not before the court would have realistic and ample alternative channels of expression. See Taxpayers for Vincent, 466 U.S. at 798. So the question properly put is whether other groups *not before the court* would have ample alternative channels for large late-night assemblies when the Curfew bans all assemblies in all parks after 11:00 p.m. History, as we have seen, provides several examples of late-night assemblies in Grant Park. Hence, it is reasonably foreseeable that other groups will want to conduct a midnight rally or vigil in Grant Park later than 11:00 p.m. It then becomes apparent that the Curfew will be "unconstitutional in a substantial number of its applications." See Wash. State Grange, 552 U.S. at 449-50.

To survive constitutional scrutiny, the time, place or manner restriction contained in the Curfew must leave citizens "ample alternative modes of communication in [the municipality]." Taxpayers for Vincent, 466 U.S. at 812. The regulation must not be judged solely by reference to the "demonstration at hand." See Clark, 468 U.S. at 296-97. A facial challenge to this Curfew must show that it restricts expression to so great an extent that citizens are left without ample alternative channels of expression for their views, not that on a particular night a certain group had no remaining channel to express their views.

Curfew Unconstitutionally Restricts Free Assembly

Grant Park's history makes clear: it constitutes the quintessential public forum. See Perry Educ. Ass'n, 460 U.S. at 45. Indeed, it was dedicated as "a public square, *accessible at all times* to the people."[20] Because Grant Park, as we have seen, provides the only logical and *realistic* place for such assemblies, the Curfew fails to allow ample alternative channels for such large late-night assemblies. See Hodgkins, 355 F.3d at 1064 (alternatives must be realistic). Streets or even plazas fail to provide a realistic alternative for several thousand people to gather. Certainly they are impracticable for 500,000 or a million people. Moreover throughout its history Grant Park has hosted such late night assemblies conducted in defiance of the Curfew, strongly indicating not only that there are no other realistic alternatives for large late night assemblies, but also that it forms the venue of choice for such gatherings. The court must defer to the speaker's choice and speakers have consistently chosen Grant Park as their forum.

Defendants, additionally, assert that the Curfew fails to narrowly tailor the restriction of assembly by completely closing down Grant Park for seven hours. Defendants point out that the closing hour applies equally to permitted and non-permitted events:

[20] Chi. Dem., Nov. 4, 1835 (italics added).

Special Event Venues
Frequently Asked Questions

Chicago Park District
Department of Park Services

Last Updated: May 6,2010

Park Hours

What time does my event have to end? Is there an additional fee to remain in the park later than 11:00pm?

All Chicago Park District property closes at 11:00pm every day. It is a requirement that every event conclude at this time.[21]

Neither the Curfew nor the other ordinances setting forth the permitting process allow an exception for any assemblies. Chi. Park Dist. B. Comm'rs, The Code of the Chi. Park Dist., ch. VII § B.2 (2012). Indeed, the City conceded at oral argument, "There is not an exception in the [Curfew] for permitted events." The Curfew spells out seven highly specific exceptions: walking or driving on a roadway that passes through a park, going to and from a park parking garage, occupying a boat in a harbor, going through on a boat, park district activities, vehicles, the Millennium Park ice rink, or picking up a car in a Park District lot. Chi. Park Dist. B. Comm'rs, The Code of the Chi. Park Dist., ch. VII § B.2 (2012). No exception is made for assemblies, permitted or non-permitted. No exception is made for First Amendment activities. See Hodgkins at 1065 (broad exemption for First Amendment activities may salvage curfew laws). Thus, on its face,

[21] http://www.cpdit01.com/resources/pdf-library/special-event-venues.general-information/Frequently%20Asked%20Questions.pdf

Grant Park District's ordinances ban all activities, expressive and non-expressive, between the hours of 11 p.m. and 6:00 a.m.

To determine whether such a blanket ban on late night assemblies tightly fits the objectives of park preservation and maintenance, the court must weigh whether the Curfew closes the park no longer than is necessary preserve park safety and greenery, collect the garbage, and make repairs. However, the City admits that it does not enforce the Curfew on certain occasions, thus implicitly conceding the Curfew closes the park longer than necessary. Notwithstanding the Curfew's rigid rule, it allows on an ad hoc basis for an "activity to extend past Grant Park District's hours of operation" if the group has complied with the permitting process. Also, allowing nighttime assemblies for permitted events only may abridge the First Amendment rights of speakers where spontaneity forms part of the message, "'dissemination delayed is dissemination denied.'" Vodak v. Chicago, 639 F.3rd 738, 749 (7th Cir. 2011). Consequently, the burden imposed on First Amendment activity is greater than necessary to serve the important government interest. If the City repeatedly make exceptions to the seven-hour closing rule, that is inconsistent with the notion that closing Grant Park every night for seven hours is necessary for park maintenance and preservation.

Moreover, no factual basis is advanced by the City to show that it is necessary to close the park for forty-nine hours every week. No averments support its contention that this Curfew broadly forbidding all events after 11:00 p.m. has any factual justification. The Park District official opines that "in order to keep parks safe, clean, attractive and in good condition that the parks *need to be closed* from 11:00 o'clock in the evening until 6 o'clock the following morning." Furthermore, the official maintains "park hours of

closure allow park employees collect trash, make repairs to park facilities, and maintain the landscaping." Also, he asserts that prohibiting access during these nighttime hours ensures "that park facilities do not become over-fatigued" and "reduces crime against park patrons and park property." However, he provides no facts to support these assertions. He fails to provide the length of time spent by park district staff during the nights working on park cleaning and maintenance that support the City's contention that the Curfew tightly fits the need. Indeed, he never avers that any work is done on the parks during the night. Nor is there a statement of how occasional events interfere so greatly with maintenance or cleaning such as would support a complete ban on nighttime events.

The official's mere assertion that the Curfew is necessary does not suffice to demonstrate the tight fit. Indeed, the credibility of his assertions is undermined by the official's apparent lack of familiarity with the maintenance and preservation of the parks. His only duties set forth in his affidavit is the granting of permits and making sure that the parks are safe, clean, attractive, and in good condition. Nowhere does he describe his knowledge of what nighttime maintenance or cleaning, if any, is performed. Indeed, he does not claim any knowledge of cleaning and maintenance functions. If it is difficult to credit his assertion that seven hours nightly is needed to clean and maintain the parks, when he apparently has no knowledge of the cleaning and maintenance functions. While the court can surmise that he possesses some familiarity with these matters, the lack of facts considerably weakens the credibility of these crucial assertions regarding the necessity of the weekly forty-nine hour closing period to accommodate cleaning,

maintenance, or even safety. Thus the probative value of his affidavit is diminished, especially in light of his admission that he makes ad hoc exceptions.

While the Curfew imposes a burden equally upon all persons in the park after 11:00 p.m., the Curfew does not tightly fit the interest served. See ACLU, 679 F.3d at 605. The burden on First Amendment rights must "not be greater than necessary" to further the important government interest. Id. The curtailment of late night assemblies in a public forum in such place as Grant Park seriously impacts expressive conduct. If it had been enforced in November 2008, it would have stopped a late night election victory rally that electrified the world. If government could limit the public's right to assemble for such nighttime rallies, it would deprive the citizenry of a powerfully expressive First Amendment activity: "There is no internet connection, no telephone call, no television coverage that can compare to ... feeling the energy of the crowd as a victorious political candidate announces his plans for the new administration..." Hodgkins at 1063.

Although it may be permissible to regulate what protesters do in the park at night, barring them from the park entirely during the night hours presents a different question. See Clark, 468 U.S. at 299 (homeless allowed to occupy park and erect tents, but not sleep). And while even the park official's unsupported opinions regarding park maintenance and preservation are entitled to some deference, broadly expansive claims invite incredulity, especially where the official's actions impeach his opinions. While park managers may properly determine camping or certain activities should be forbidden in the park based on park preservation or maintenance concerns, curtailing all access by First Amendment actors to a public forum during a time of day that forms the most appropriate time for many forms of expressive conduct falls beyond their expertise. See

Id.; cf. Grace, 461 U.S. at 177-84 (complete bans in any particular forum of any particular form of expression violate the First Amendment).

The historical use of Grant Park for such nighttime assemblies and the absence of evidence sufficient to justify such a broad curtailment of significant First Amendment activity renders the Curfew unconstitutional. Because nighttime assemblies form a particular type of First Amendment activity, see Hodgkins, 355 F.2d at 1062, a ban on nighttime rallies bans a particular kind of expressive activity in a particular public forum. Cf. Grace, 461 U.S. at 177-84 (ordinance forbidding carrying on the sidewalk a flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement).

The "'government may not regulate expression in such a manner that a *substantial portion of the burden on speech does not serve to advance its goals.*'" Hodgkins, 355 F.2d at 1060 (italics added). Because the City admits that the Curfew has not been enforced and that it has allowed events to extend past 11:00 pm., it implicitly concedes that the Curfew imposes a burden on expressive activities that "does not serve to advance its goals." Id. The City's loose enforcement compels the conclusion that the Curfew imposes a burden on First Amendment rights "greater than necessary to further the important governmental interest at stake." ACLU v. Alvarez, 679 F.3d 583, 605 (7th Cir. 2012). Additionally, the unwritten ad hoc policy of granting exceptions can hardly diminish the *forceful discouragement* wrought by the text of the ordinances and website statement banning all nighttime assemblies. See Hodgkins, at 1063 (forceful discouragement impermissibly chills expressive activity). Moreover, the ad hoc policy

certainly does not create an exemption for First Amendment activity. See Hodgkins at 1065 (broad exemption for *First Amendment* activities may salvage curfew laws).

Reviewing the parade of nighttime assemblies hosted in Park's past, there exists a "'a realistic danger that the [Curfew] will significantly compromise recognized First Amendment protections of parties not before the Court.'" New York State Club Ass'n, Inc., 487 U.S. at 11. Consequently, it violates the First Amendment. Because the Curfew facially violates the First Amendment, that amounts to "affirmative matter," compelling dismissal. See Virginia v. Black, 538 U.S. 343, 387 (2003) (Souter, J., concurring in part, dissenting in part) (facial invalidation requires dismissal of charges); 735 ILCS 5/2-619(a)(9) (2012); Pryweller v. Cohen, 282 Ill. App. 3d 899, 907 (1st Dist. 1996) (an affirmative matter barring a claim defeats the claim). Although the Curfew is content-neutral and serves a substantial government interest, it is not narrowly-tailored and it fails to leave open ample channels for large late-night assemblies; it does not tightly fit the legitimate government interests. Thus, the portion of Defendants' dismissal motion grounded in the facial invalidity of the Curfew must be granted.

Having found that the Curfew violates the First Amendment, it certainly runs afoul of the greater protections of the Illinois Constitution against government restrictions on citizens' right to assemble. 3 Record of Proceedings 1403; see also DiGuida, 152 Ill. at 120-21. The Illinois Constitution supports the argument for dismissal on the grounds that the Curfew is facially invalid. In particular, because Illinois extends free assembly protection to non-expressive assemblies, that substantially increases the number of applications in which the Curfew would infringe on the right to free assembly. Ill. Const. art. I, § 5; Lousin at 47. Illinois protects non-expressive assemblies of picnickers as well

as expressive assemblies of protesters. Late night picnics or social assemblies fall within the protections of Illinois' free assembly clause. And, thus, the Illinois Constitution provides independent and adequate state grounds for such dismissal. Consequently, the Curfew fails to survive a facial challenge brought under both the First Amendment of the United States Constitution and Article I, Section 5 of the Illinois Constitution.

2. The Curfew is Unconstitutional As Applied to Defendants

The Defendants, in their as-applied challenge, argue that the Curfew has been enforced selectively in a viewpoint discriminatory way. McGuire v. Reilly, 386 F.3d 45, 61-62 (1st Cir. 2004) (citing Thomas v. Chicago Park Dist., 534 U.S. 316, 325 (2002)). Defendants allege that "the [C]ity chose to end the Occupy Chicago rally and arrest Defendants because of their message" and that the Curfew was enforced "to show the world how tough this new Mayor could be ...." Defendants argue that none of the 500,000 participants in the Obama rally were arrested and all of the 303 Occupy Chicago protesters who remained after being asked to leave were arrested.[22] While the City does not contest those facts[23], it argues the two groups are not similarly situated. While "people attending a rally for President Obama in Grant Park ... were allowed to remain after 11 p.m.,"[24] the City argues it was irrelevant "by virtue of the fact that it was a

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[22] Estimates by other media and city sources place the crowd at Grant Park to have reached up to 240,000, 70,000 of which had tickets prior to the event. Liza Hogan, "Chicago's Grant Park turns into jubilation park." Viewed online at: http://www.edition.cnn.com/2008/POLITICS/11/05/chicago.reax/?iref=mpstoryview.; "240,000 pack Grant Park for election rally." Viewed online at http://www.abclocal.go.com/wls/story?section=news/politics&id=6489707.

[23] On the nights of the Occupy Chicago arrests, the City admits that of the 303 remaining after being told to depart, it arrested all 303.

[24] Based on a 10:57 p.m. time reference for Obama's approach to the stage, Obama's speech ended near 11:20 p.m. and exited the stage around 11:23 p.m. according to a C-SPAN video of Obama's full delivery of the speech. See, [http://www.youtube.com/watch?v=jJfGx4G8tjo]

permitted event." However, the City concedes, "[t]here is not an exception in the [Curfew] ordinance for permitted events." The City alternatively argues that the Defendants are dissimilar for another reason: the Obama rally participants, unlike Defendants, never "stated that they were going to remain there or that they had no intention of leaving...."

Although facially valid, enforcement of the Curfew against a given person in a particular situation may be invalid on an as-applied basis. See Thomas, 534 U.S. at 323; McGuire, 386 F.3d at 61. In contrast to a facial challenge, an as-applied challenge contends the law was unconstitutionally enforced against a *particular* speech activity, even though the law may be capable of valid application to others. Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998) (citing Taxpayers for Vincent, at 803 n. 22). Viewpoint discrimination claims allege that the government has preferred the message of one speaker over another. McGuire, 386 F.3d at 62. Of course, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Id. (citing Taxpayers for Vincent, 466 U.S. at 804).

While grounded in the First Amendment, an as-applied challenge to the enforcement of an ordinance constitutes an "equal protection challenge based on discriminatory enforcement of the laws...." Id. at 62-63. The Constitution does not require exacting precision and equality in the enforcement of local ordinances. Piece Meal, Ltd. v. Bellwood, 1991 U.S. Dist. LEXIS 14604 (N.D. Ill. 1991) *9; Hameetman v. City of Chicago, 776 F.2d 636, 641 (7th Cir. 1985). Unequal enforcement of a local ordinance becomes unconstitutional only if the inequality has some invidious purpose. Piece Meal, Ltd., at *9; Dauel v. Board of Trustees, 768 F.2d 128, 131 (7th Cir. 1985),

citing, Oyler v. Boles, 368 U.S. 448, 456 (1962). Consequently, to successfully bring a First Amendment selective enforcement claim, a plaintiff must establish: (1) that they received different treatment from others similarly situated; and (2) the differing treatment was clearly based on their exercise of First Amendment rights. See Piece Meal, Ltd., at *9; Ciechon v. City of Chicago, 686 F.2d 511, 523 n.16 (7th Cir. 1982) (selective prosecution is permissible as long as it is not based on clearly impermissible grounds); see also Shlay v. Montgomery, 802 F.2d 918, 924-25 (7th Cir. 1986) (requiring evidence from which intentional invidious discrimination could be inferred).

Under the Equal Protection guarantee, though a municipal ordinance itself be fair on its face and impartial in appearance, "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (all Chinese laundry operators arrested, no white laundry operators arrested). Where the "fact of this discrimination is admitted," no reason for it is shown, the "conclusion cannot be resisted, that no reason for it exists except hostility...." Id.; see also Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266 (1977)(addressing pattern evidence); McGuire, 386 F.3d at 63-64.

A pattern may give rise to an inference of intent. Feeney, 442 U.S. at 275; McGuire, 386 F.3d at 63-64. Pattern evidence, together with "the totality of the relevant facts," must show intent to discriminate. Washington, 426 U.S. at 241-42; McGuire, 386 F.3d at 63-64. In a First Amendment context, pattern evidence may more readily give

rise to an inference of intent. McGuire, 386 F.3d at 63-64.[25] Defendants, however, must prove that the City *intended* to discriminate against them. See Wayte v. United States, 470 U.S. 598, 608 (1985) (selective enforcement must be established by showing both discriminatory effect and purpose). Discriminatory purpose implies more than "awareness of consequences," it implies that the decision-maker "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Id. at 610.

Defendants have established that they received different treatment from others similarly situated. The City's two attempts to distinguish the Obama victory rally participants fail. While the Obama rally was a permitted event, it remains similarly situated because as the City conceded in oral argument the Curfew provides no closing time exception for permitted events.

Refusal to depart also fails to distinguish the Defendants from the Obama rally participants.[26] The Curfew provides that "No person shall be or remain ... in any part of any park ... between the hours of 11:00 p.m. and 6:00 a.m. on the following day ...." Chi. Park Dist. B. Comm'rs, The Code of the Chi. Park Dist., ch. VII § B.2 (2012). Hence it appears irrelevant for purposes of enforcement of the Curfew whether the person

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[25]Because the Illinois Constitution provides *more* protections than the federal right of free assembly, the inference of selective enforcement would perhaps be even stronger than in the federal context. Cf. 3 Proceedings at 1403; DiGuida, 152 Ill. 2d at 120-21.

[26] History provides several examples where the City declined to enforce the Curfew. Worshipers refused to leave Grant Park after being informed by the police about the closing time and were not arrested in 1979. "Campers defy police: Vigil starts early at park," Knott, Andy, Chicago Tribune (1963-Current file); Oct 5, 1979, pg. 10. Dean Blobaum, Chicago '68: A Chronology available at http://chicago68.com/c68chron.html; Jeff Lyon, *The World Is Still Watching: After The 1968 Democratic Convention, Nothing In Chicago Was Quite The Same Again,* Chi. Trib. Jul. 24, 1988: I8, pp. 12-13; *DEMS RECESS IN UPROAR: 800 Guardsmen Farce Hippies in Park, at Hotel Called Out to Give Police Relief,* Chi. Trib., Aug. 28, 1968, at 1.

announce an intent to remain. Indeed the City does not dispute that the rally participants remained in the park after 11:00 p.m. Actually remaining demonstrates intent to remain more strongly than mere words. Examining the Curfew, it does not distinguish between those who announce intent to remain and those who do not; on its face, it penalizes all those who remain after 11:00 p.m. That the protesters indicated intent to remain after having been given notice to depart has no significance vis-à-vis the Curfew. Compare 720 ILCS 5/21-3(3) (requiring notice to depart) with Chi. Park Dist. B. Comm'rs, The Code of the Chi. Park Dist., ch. VII § B.2 (2012) (which does not require notice to depart). Being in the park after 11:00 p.m. violates the Curfew. Thus both the Occupy protesters and the Obama rally participants were similarly situated vis-à-vis the Curfew; they were both equally in violation.

The fact that one group was never told to leave and another group was told to leave further highlights the disparate treatment accorded each group rather than rendering them differently situated. As to enforcement of the Curfew, it is the terms of the Curfew that determine whether the groups are similarly situated. If two different groups violate the Curfew in a similar manner, they are similarly situated. Here the Curfew imposes criminal liability upon anyone who remains in the park after 11:00 p.m. However the procedure employed by the City, arresting only those who after police inquiry announce their intent to remain, "effectively grants police the discretion to make arrests selectively on the basis of the content of the speech." City of Houston v. Hill, 482 U.S. 451, 466 n.15 (1987) (addressing a facial challenge).

The City's construction of the Curfew transforms it from a time, place, and manner restriction into a Curfew that vests limitless discretion with the police. Under the

City's construction, it is not the physical act of remaining in the park after 11:00 that forms the violation, but rather the announcement of intent to remain after police inquiry. That confines violations of the act to those people the police question in their discretion. If the police do not choose to question the 500,000 rally participants, they are not deemed to be in violation of the Curfew. Grafting onto the Curfew a new element of the offense, i.e. that the offender fails to leave after being given notice to depart, "accords the police unconstitutional discretion in enforcement" because no violation occurs if the police decline to give notice to depart. Id. at 466. Only the protesters are told to leave; thus, only these "individuals -- those chosen by the police in their unguided discretion -- are arrested." Id. at 466-67. This flies in the face of the Curfew's plain language that provides no exceptions for those who intend to leave or for those who have a permit.

The City treated two similarly situated groups differently. But that alone does not suffice to show an Equal Protection violation; Defendants must show that the differing treatment was based on clearly the exercise of First Amendment rights. See Piece Meal, Ltd., at *9. Nevertheless, even with only three instances before the court (the two Occupy protests and the Obama rally), there is a clear pattern; no arrests when 500,000 people remain in the park past the Curfew for the Obama rally, 100% non-enforcement of the Curfew; and all 303 who remained after being asked to leave on the two nights, 100% enforcement of the Curfew. See Yick Wo, 118 U.S. at 373-74 (all Chinese laundry operators arrested, no white laundry operators arrested). Thus, the Defendants have shown "a pattern of unlawful favoritism" in the enforcement of the challenged ordinance. Thomas, 534 U.S. at 325. This sharp pattern gives rise especially in the First Amendment context to an inference of viewpoint discrimination. McGuire, 386 F.3d at

63-64. The "fact of this discrimination is admitted" and no reason is shown. Yick Wo, 118 U.S. at 373-74 (1886). This strongly supports the conclusion that the difference in treatment stems from hostility. Id. However, the pattern evidence forms but a piece of "the totality of the relevant facts" that reveals the intent to discriminate. Washington, 426 U.S. at 241-42; McGuire, 386 F.3d at 63-64.

In support of their argument that the difference of treatment stems from the City's hostility to their viewpoint, Defendants urge the court to examine how the protesters were treated by the City in the days surrounding their arrests. The City submitted no counter-affidavits, thus the court must take the Defendants' account as true. Defendants argue that the City revealed its intent to discriminate by its treatment of the protesters over the month preceding their arrest. In September 2011, Defendants began their protest in the financial district, at the Federal Reserve Bank. The movement began receiving supplies and donations. At first, the police allowed the protesters to store supplies at the edge of the sidewalk against a row of planters, pursuant to an agreement reached by the police and the protesters. Over the next few days, however, the police brought dogs to sniff the protesters supplies.

On September 26, Lieutenant Serafini of the Chicago Police Department demanded only two things: that the protesters not sleep on the sidewalk and that they make a path broad enough for pedestrians. Although the protesters complied with his requirements, on September 29, the police informed the protesters their supplies had to be moved. They were given three different explanations for this new demand. First, the protesters were told no object can sit on the sidewalk longer that needed to load it into a vehicle. Second, they were told that the supply containers blocked pedestrian traffic.

Barricades had been newly placed on the sidewalk that made it difficult for pedestrians to pass. Although it was the barricades, rather than the supply containers, that caused the blockage, it was the containers that had to go. Third, the protestors were told they had to move the supplies because they constituted "a security threat." After these three explanations for the police policy change, the protesters then moved the supplies and shifted them onto rolling carts. Later that same day, the rules changed again. The police now issued an ultimatum: "'move it or we throw it away.'" A police lieutenant told the protesters that their efforts to remove items from the site in front of the Federal Reserve were not good enough; he explained that all supplies not relocated to the off-site storage area by 9 a.m. the next day would be thrown away. Faced with multiplying restrictions, the protesters moved across the street.

After the demonstrators moved across the street, in front of the Bank of America building, however, the police intensified their monitoring of the protesters, visiting almost "every morning and during the evening rush hour period and during random times of the day." While initially they simply requested supplies be moved to carts, they later required that "all items on site must be in carts and must move at least a few inches regularly." Subsequently, the police ratcheted up the requirements again: demanding not merely regular movement, but constant motion. In mid to late October, strictly enforcing the constant motion requirement, the police began "confiscating donations and supplies." The police confiscated "drums, carts carrying signs, food, water, and medical supplies." Sometimes "items would be confiscated while members of Occupy Chicago were attempting to comply with the police order to move items by pushing two carts at once...." The protesters marched to the Pritzker Pavilion in Millennium Park, but the

police asked the protesters to "leave the Pavilion and identified the park at Michigan and Congress as an alternate location where Occupy Chicago could assemble."

The Occupy Chicago demonstrators were subject to constantly changing rules and regulations that ended in a directive that they had to be constantly moving in order to protest. Viewed in isolation the rules and regulations appear reasonable, but viewed in the larger context of the Occupy movement's presence in Chicago, they give rise to an inference that the City was attempting to discourage this particular protest. The police would promulgate a rule; when the protesters would comply, the police would change the rule. The protesters were pushed from sidewalk in front of the Federal Reserve to the sidewalk in front of the Bank of America Building. After being constantly monitored at LaSalle and Jackson, they marched to Millennium Park. There the police told them they should move to Grant Park. And it was there they were arrested. These facts, together with the clear pattern of selective enforcement of the Curfew, support a finding that the City *intended* to discriminate against Defendants based on their views. See Wayte, 470 U.S. at 608. The decision-maker "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Id. at 610.

Having established (1) that they received different treatment from others similarly situated; and (2) the differing treatment was based on clearly the exercise of First Amendment rights, the Defendants have established that the Curfew as applied to them was unconstitutional. See Piece Meal, Ltd., at *9. This too amounts to "affirmative matter" justifying dismissal. Cf. 735 ILCS 5/2-619(a)(9) (2012); Pryweller, 282 Ill. App. 3d at 907 (affirmative matter defeats a claim).

VI. Conclusion

The Curfew on its face violates the right to free assembly under both the First Amendment of the United States Constitution and Article I, Section 5 of the Illinois Constitution. The Curfew as applied to the Defendants violated the Equal Protection Clause of the United States Constitution. For the above reasons, the court grants Defendants' Joint Motion to Dismiss.

Entered the 27th of September 2012
Chicago, Illinois

Thomas More Donnelly
Associate Judge

Associate Judge
Thomas More Donnelly
SEP 27 2012
Circuit Court - 1803